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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922, No. 208.

(Was No. 620, October Term, 1921.)

BALTIMORE & OHIO RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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(28,575)

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STATEMENT.

The cause herein comes to this court on appeal from the Court of Claims.

Appellant, prior to November 12, 1918, and on or about the fifteenth day of December, 1917, entered into an informal or implied agreement with an offi-

cer or agent acting under the authority, direction, or instruction of the Secretary of War of the United States on behalf of the United States for the payment by the United States to your appellant for extraordinary expenses and excess cost of construction of the Marley Neck Branch Railroad of your appellant situated in the State of Maryland, and for the payment of the construction of a special detour track, trestle and turnout in connection with the construction of the said Marley Neck Branch Railroad to the site of the United States Ordnance Depot, Curtis Bay, Maryland, in order that the United States might obtain material for the construction of its Ordnance Depot at Curtis Bay, Maryland. Under date of December 15, 1917, Major F. M. Gunby, of the Quartermaster's Corps, had emphasized by letter to appellant's General Superintendent, M. H. Cahill, the urgency of the construction of the said Marley Neck Branch Railroad to be extended to the United States Ordnance Depot at Curtis Bay for handling construction material and freight at the earliest possible moment. In addition to the aforesaid a number of other army officers conferred with claimant's agents to speed up the work of construction of the said Marley Neck Branch Railroad in every possible way. Appellant had, under date of September 25, 1917, contracted with the McLean Contracting Company of Baltimore, Maryland, to construct the said Marley Neck Branch Railroad on a unit-price basis, and, in order to meet the urgent needs of the United

States for the transporting of material and freight to the United States Ordnance Depot at Curtis Bay and to expedite the same, was compelled to cancel its agreement with the McLean Contracting Company, and under date of January 5, 1918, appellant entered into a contract with the Empire Engineering Company on a cost-plus basis to complete the construction of the said Marley Neck Branch Railroad, and the said Empire Engineering Company commenced work on said construction on January 6, 1918, and continuously pursued the said work of construction both day and night from the said January 6, 1918, until the completion of the said construction, in the latter part of February, 1918.

Compensation is sought by appellant solely for the excess cost of construction of the said Marley Neck Branch Railroad occasioned by the requests of the officers of the War Department for the urgent needs of the United States in requiring the prompt and expeditious construction of the Marley Neck Branch Railroad so material and freight could be furnished to the United States at the Curtis Bay Ordnance Depot. The nature, terms and conditions of the informal or implied agreement are fully set forth in the petition (pages 1 to 12, inclusive).

Appellant, under date of June 27, 1919, presented its claim to the War Department, in the amount of $9,058.55, for the excess cost of construction and extraordinary expenses occasioned by the necessities of the said Marley Neck Branch Railroad and

said claim was presented under the provisions of the Act of March 2, 1919, 40 Statute L., 1272, known as the Dent Act. The said claim was amended on April 2, 1920, and the amount increased to $85,-474.06, due to the fact that when the original claim was filed by the Federal Auditor the amount of $9,085.55 was based solely upon the cost of labor and material incidental to the construction of the temporary detour track of the Marley Neck Branch Railroad. Under the Dent Act it was necessary to file the claim prior to June 30, 1919, and the Federal Auditor compiled the figures as were then available. As soon as the additional expense items became available, the claim was amended on April 2, 1920, and the amount increased to cover all the items of the claim and said amended claim was passed upon by the War Department.

On June 4, 1920, the Claims Board, Transportation Service, War Department, denied relief to your petitioner. Appeal was then taken to the Appeal Section, War Department, and a hearing was had before said Appeal Section on July 16, 1920. On August 12, 1920, the Appeal Section denied relief to appellant, but in its decision said:

> *"While the construction in question inured to the benefit of the War Department by enabling it to get certain of its materials into the Ordnance Supply Depot at Curtis Bay,* yet that was not the sole object of the construction of this track." (Italics ours.)

On August 20, 1920, appellant appealed to the Secretary of War, but that official denied relief to your appellant under date of November 24, 1920.

Appellant, under date of May 4, 1921, filed its petition in the Court of Claims for the recovery of the amount of its said claim passed upon by the War Department and demurrer was filed by the United States to appellant's petition on June 29, 1921. On October 11, 1921, the demurrer was argued and submitted, and under date of October 24, 1921, a written opinion was handed down by the Court of Claims dismissing appellant's petition.

SPECIFICATION OF ERRORS.

1. The appellant claims that the Court of Claims erred in sustaining the defendant's demurrer, as the petition does state facts sufficient to constitute a cause of action under the Dent Act, 40th Statute L., 1272, and said cause of action is within the jurisdiction of the court.

2. The court erred in holding that the appellant did not rely on the allegations contained in paragraph 1 of the petition in connection with the nature, terms, and conditions of the informal or implied agreement that is fully set forth in the petition.

3. The court erred in holding that no agreement can be inferred from the facts relied upon by appellant which obligates the United States to pay the money claimed to be due.

4. The court erred in saying that the facts a
leged do not disclose any agreement, express
implied, between appellant and the United State
as the court could not determine the existence of t
implied agreement or the implication of a promi
to pay without having before it the testimony a
duced in support of the allegations of the petitio

BRIEF.

ARGUMENT.

POINT 1.

COURT OF CLAIMS ERRED IN SUSTAINING DEMURRER.

The decision of the Court of Claims in this case is, in our judgment, entirely in error.

The court states that appellant, "Not relying on the aforesaid allegation," meaning paragraph one of the petition, "proceeds to set out in its petition the facts from which it deduces that an informal or implied agreement was entered into by the United States," and that "It is not necessary to set out in this opinion these facts, which are recited in full in the petition." Appellant insists that the allegations of paragraphs 1, 2, and 3 are not separable and must be considered together in the matter of appellant's claim. Paragraphs 2 and 3 of the petition amplify and set out the basis of the informal or implied agreement contained in paragraph 1 of the petition. Appellant contends that the petition is clear as to the allegations.

The court further states:

> "Suffice it to say that after a careful examination of the facts relied upon by the petitioner, the court is of opinion that no agreement can be inferred from them which

> obligates the United States to pay the money claimed to be due. The facts alleged in the petition do not disclose any agreement, express or implied, between the petitioner and the United States, and therefore this court cannot give relief either under the Dent or Tucker Acts. In order to recover in this court under either act there must be a promise to pay, or the implication of a promise to pay." (Rec., p. 14.)

To this we strongly dissent, for we insist that the petition filed in this case presents in its statement facts and conditions which, if proven, would be, under a sufficient and fair base, an implied agreement under the Dent Act. The Court of Claims states that in order to recover in that court "there must be a promise to pay, or the implication of a promise to pay." How can an implication of a promise to pay on an implied contract be shown without a full statement of the proven facts of the petition before the court? We say that it is necessary to have the testimony in support of the allegations of the petition before the court in order to determine an implication of a promise to pay under an implied contract, and that the Court of Claims erred in sustaining the demurrer to the petition without giving appellant an opportunity to submit its evidence in support of the allegations of the petition.

POINT 2.

PRESENTATION OF CLAIM UNDER THE DENT ACT.

Under date of March 2, 1919, there was enacted what is known as the Dent Act, "An act to provide relief in cases of contracts connected with the prosecution of the war and for other purposes (40th Statute L., 1272). Section 1 of that act provides as follows:

> "That the Secretary of War be, and he is hereby authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person,

> firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law."

The court will take judicial notice that the Dent Act became a law March 2, 1919, and no opportunity was afforded to present this claim under that act to the War Department until after March 2, 1919, and before June 30, 1919. It will be observed that the War Department took jurisdiction of the claim under the Dent Act.

The purpose and scope of the Dent Act is to afford relief in cases of this kind, and the memorandum of the War Department to Congress outlining the purposes of the legislation in question shows this very clearly.

It is stated in said memorandum, in part, as follows:

> "Yielding to the exigencies of the war situation, such contractors put the work of production ahead of the work of negotiation, and have often put themselves in a position where their only reliance was the good faith and fairness of the Government in finally fixing the terms of the agreement. For example, in the manufacture of a certain important type of gun it was thought impracticable to determine the proper price basis at the time the order for the production of the gun was given, as there was insufficient experience as to what the cost of manufacture would be and the determination of the price; and so the final execution of the for-

mal contract was left until there would be sufficient actual manufacturing experience for the Government to make a proper determination as to price. Further, there are a number of instances where the Government, in execution of its plans for the erection of a munition plant or the creation of a cantonment, induced the occupants of land to vacate it and go to considerable expense without any agreement as to compensation for the purchase or use of the land having been actually reached. With the armistice the plans of the Government have been so changed that the Government cannot properly now proceed with the purchase of the land in question, and there is nothing between the Government and the persons who have vacated their land but a vague, implied agreement to compensate them. * * *

"Nor should the patriotism be penalized of those who in the exigencies of the war have gone ahead to produce instead of waiting to bargain. It is true that such persons have nothing to rely on except the good faith of the United States, but surely there should be no more solid ground for reliance than that good faith."

(House Report No. 877, 65th Congress, 3rd Session.)

Furthermore, the act provides for the filing of the present claim in the Court of Claims, as shown by section 2:

"That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company, or corporation referred to in

section 1 hereof to find and award fair and just compensation in the cases specified in said section in the event that such individual, firm, company, or corporation shall not be willing to accept the adjustment, payment, or compensation offered by the Secretary of War as hereinbefore provided, *or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment, or compensation as provided for in said section.*"

(Section 2 of Dent Act, 40th Statute L., 1272, March 2, 1919.) (Italics ours.)

Appellant contends that by the aforesaid section jurisdiction is conferred on the Court of Claims to hear and adjudicate the instant case upon the merits.

It was said by this court:

"In passing upon these questions we wish it to be distinctly understood that we express no opinion in this case except upon the jurisdiction of the circuit court to entertain this bill and its authority to pass upon the several defenses set up in response thereto. We do not say that the court may not ultimately come to a conclusion to dismiss the bill upon its own allegations, if the several questions be raised by demurrer; but we do not think it was proper to dispose of them by motion to dismiss for want of jurisdiction. The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has at-

tempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits."

Illinois Central Railroad Co. *vs.* Adams, 180 U. S., page 39.

And this court further stated:

"A contract, express or implied in fact, must, it is true, be established, but one to pay for a mechanism used will be implied rather than a tortious appropriation of it—rather than the exercise by the United States of its sovereignty in aggression upon the rights of its citizens."

United States *vs.* Bethlehem Steel Co., No. 127, decided April 10, 1922.

In a very recent case this court has said:

"The present case was decided upon demurrer. The question, therefore, is not what inferences should be drawn from the facts that may be proved, but whether the allegations, if proved, would require, or at least warrant, a different finding from those previously reached."

Portsmouth Harbor Land & Hotel Company *et al. vs.* United States, No. 97, decided December 4, 1922.

POINT 3.

TESTIMONY IN SUPPORT OF ALLEGATIONS OF THE PETITION SHOULD BE BEFORE THE COURT SO AS TO DETERMINE THE EXISTENCE OF THE IMPLIED AGREEMENT.

Appellant contends that the Court of Claims erred in saying that the facts alleged do not disclose any agreement express or implied between appellant and the United States as the court could not determine the existence of the implied agreement or the implication of a promise to pay without having before it the testimony adduced in support of the allegations of the petition. This court has said:

> "If the petition can be fairly said to present the claim that the United States, not simply by virtue of succession to sovereignty under the treaty of cession, but through its subsequent transactions with the appellant, and by contract to be implied from such transactions, has become indebted to the appellant, we think that the claim, as thus limited, would be within the jurisdiction of the court below under the act of 1887. It is true that the averments of the petition lack definiteness. It is not specifically alleged that the United States has received the tax or enjoyed the benefit of the half rates, nor is it precisely stated what transactions have been had between the Government and the appellant. But the petition alleges that the

United States, since it entered into the occupancy of the Islands, has 'availed itself of all the benefits and advantages' of the submarine cable and telegraph lines established by the appellant, 'using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do,' and that "it has become in all respects the successor of the Government of Spain to all rights, privileges, and advantages conferred upon and secured and reserved to the Government of Spain under the terms of the aforesaid concession.' These general allegations are not altogether inapposite with respect to a claim based upon an implied contract outside of the treaty itself, and the claimant should not be denied the right to have its claim, thus considered, adjudicated. In this view, the petition would be susceptible of amendment, and its sufficiency, in law and fact, could be heard and determined.

"We express no opinion upon the merits of the claim, in this aspect, as they are not before us, the court below having declined to take jurisdiction. But as we think there was jurisdiction to pass upon the claim under the limitations above stated, the judgment will be reversed and the cause remanded, with instructions to the court below to take further proceedings in conformity with this opinion."

Eastern Extension, Australasia & China Telegraph Co. *vs.* United States, 231 U. S., page 326.

In the aforesaid case, which was subsequently tried in the Court of Claims (54 C. Cls., 108), judgment was rendered by the Court of Claims in favor of the defendants. Upon appeal from said decision this court, in 251 U. S., 355, affirmed the lower court.

In the opinion of the court, by Mr. Justice Clarke, he states in part:

> "The United States denied all liability, and the judgment of the Court of Claims, dismissing the petition, is before us for review.
>
> "The case was here before on appeal and this court held (231 U. S., 326; 58 L. Ed., 250; 34 Sup. Ct. Rep., 57) that the case as then stated in the petition was not within the jurisdiction of the court of claims, whether viewed as asserting an obligation growing directly out of the treaty with Spain or one imposed by principles of international law upon the United States as a consequence of the cession of the Islands by the treaty. The court, however, referring to certain general and indefinite allegations in the petition, suggested that the implication might be drawn from them that there may have been action on the part of officials of the Government of the United States since it had assumed sovereignty over the Islands, which, if properly pleaded and proved, would give rise to an implied contract with the claimant outside the treaty, which would be within the jurisdiction of the court of claims, and, to the end that the right to have such a claim adjudi-

cated might be saved, if it really existed, the case was remanded for further proceedings in conformity with the opinion."

And, concluding, he further states:

"In the jurisdiction given to the court of claims Congress has consented that contracts, express or implied, may be judicially enforced against the government of the United States. But such a liability can be created only by some officer of the government lawfully invested with power to make such contracts *or to perform acts from which they may be lawfully implied.* Langford *v.* United, 101 U. S., 341, 345; 25 L. Ed., 1010, 1012; United States *v.* Buffalo Pitts Co., 234 U. S., 228; 58 L. Ed., 1290; 34 Sup. Ct. Rep. 840; Temple *v.* United States, 248 U. S., 121; 63 L. Ed., 162; 39 Sup. Ct. Rep., 56; Ball Engineering Co. *v.* J. G. White & Co., 250 U. S., 55; 63 L. Ed., 840; 39 Sup. Ct. Rep., 393." (Italics ours.)

Eastern Extension, Australasia and China Telegraph Company *vs.* United States, 251 U. S., 355.

And this court has further stated:

"If objected that the petition contains no count upon an implied contract for *quantum meruit,* it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due

> to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived."
>
> Thomas L. Clark *vs.* United States, 95 U. S., page 539.

Furthermore, this appellant, in the emergency and stress of war, without attempting to bargain, proceeded to assist the United States in a very important and urgent matter, and it should not be deprived of its property without an opportunity for a hearing upon the merits.

There is the fact of not one, but a number of conferences between officers of the War Department and appellant's officials in order to expedite the construction of the said Marley Neck Branch Railroad, and a more detailed knowledge of said conferences, as averred in the petition, can be examined only after testimony in regard to them has been introduced by appellant in order to determine their full purport, which cannot be done in the petition.

It has been held:

> "In implied contracts 'the parties have capacity to contract; facts, circumstances, few or many, clear or complicated, exist, which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words even may negative such meeting, but "acts which speak louder than words" may conclude him who denies a tacit contract.' Sceva *vs.* True, 53 N. H., 627, 629."
>
> 13 Corpus Juris, page 242.

The Court of Claims has said:

> "Implied contracts in fact do not arise from the denials and contentions of parties, but from their common understanding in the ordinary course of business, whereby mutual intent to contract without formal words therefor is shown. (Hertzog *v.* Hertzog, 29 Pa. St., 465, and authorities there cited; Harley *v.* United States, *supra.*)
>
> Knapp *vs.* United States, 46 Ct. Cl., 643.

And in order to show "their common understanding" we insist that testimony should be permitted to be introduced in the instant case, for it has been held:

> "An implied contract, as well as an expressed contract, should be established by proof, to authorize recovery thereon, and the burden of proof rests upon the plaintiff."
>
> Richardson *vs.* Hoyt, 60th Iowa P., 70.

And it has been further held:

> "The cases holding that where no attempt has been made to reduce the terms of a contract to formal language the intention of the parties as gathered from what they said and did is a question of fact for the jury are very numerous. Tatterson *vs.* Suffolk Manufacturing Co., 106 Mass., 56, may stand for the class."
>
> Gannon *vs.* Brady Brass Co., 82 New Jersey Law Reports, page 414.

In Knote *vs.* United States, in 95 U. S., at page 149, in defining the jurisdiction of the Court of Claims and what constitutes an implied contract, this court said:

> "The jurisdiction of that court is limited to claims founded upon a law of Congress, or upon a regulation of an Executive Department, or upon a contract, express or implied, with the Government. The claim here presented rests upon a supposed implied contract to pay to the claimant the money received as the proceeds of the forfeited property. *To constitute such a contract, there must have been some consideration moving to the United States; or they must have received the money, charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was reserved as in the case of money paid by mistake.*" (Italics ours.)

In the instant case the Appeal Section of the War Department, in its decision denying relief, said:

> "*While the construction in question inured to the benefit of the War Department by enabling it to get certain of its materials into the ordnance supply depot at Curtis Bay, yet that was not the sole object of the construction of this track.*" (Rec., p. 5.) (Italics ours.)

It will be observed that it is stated:

> "yet that was not the sole object of the construction of this track."

This appellant never contended that it was and does not now make such a contention. It does, however, earnestly and sincerely say that the United States required speedy construction and should, therefore, pay for the excess cost of the said construction of the road. There would have been no need for the excess cost if it were not for the emergency of war and the needs of the War Department in desiring a speedy construction of the road. And the War Department makes the frank admission that a service was rendered it in that part of its decision hereinbefore set forth.

In Ball Engineering Company *vs.* J. G. White and Company, 250 U. S., 55, this court said:

> " 'The law will imply a promise to make the required compensation, where property to which the Government asserts no title is taken, pursuant to an act of Congress, as private property, to be applied for public use,' or, in other words: 'Whenever, in the exercise of its governmental rights, it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.' But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not, and was not conceded to be, in the plaintiff."

In that case it will be noted that while the court did not find there was an implied contract to pay or an implication of a promise to pay yet the court did not merely base its findings upon the pleadings, but both upon the pleadings and the facts. In the instant case the court made its finding solely upon the allegations of the petition and the demurrer of the defendants.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be reversed for the following reasons:

1. The petition states facts sufficient to constitute a cause of action under the Dent Act and said cause of action is within the jurisdiction of the Court of Claims.

2. That the appellant should be permitted to submit its case on the merits in order that the court may determine the implied agreement averred in the petition after consideration of the evidence adduced in support of the allegations of the petition.

Very respectfully,

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